Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of The United States
October Term 1996

CHRISTINA LEAP AND PAUL SIPPLE, INDIVIDUALLY AND PAUL SIPPLE, EXECUTOR OF THE ESTATE OF MARTHA ROSE SIPPLE, DECEASED,
Petitioners,

v.

PAUL MALONE, ALLOY FABRICATORS, INC. AND F & K LEASING, INC.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Case Involves Important Direct and Unresolved Conflicts With Decisions of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits Concerning the Conclusive Effect Of Expert Testimony in These Circumstances.

2. This Case Involves An Important, Direct & Unresolved Conflict With The Decision Of the United States Supreme Court in Bene vs. Jeantet, 129 U.S. 683, 32 L.Ed. 803, 9 S.Ct. 428 (1889).

3. The Panel Decision Disregards Sixth Circuit Precedent And Violates ***Stare Decisis***.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Christina Leap, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 23, 1996.

OPINIONS BELOW

On July 27, 1995, the United States District Court rendered its decision in which the Court entered a judgment on a jury verdict in favor of Plaintiff (Petitioner) in the amount of $754,677,83. A copy of the District Court's Opinion appears in the Appendix hereto. The opinion of the Court of Appeals also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 23, 1996. Subsequently on January 6, 1997, Petitioner filed a Petition for Rehearing with the Court of Appeals which was denied on February 10, 1997. This petition for certiorari was filed within ninety (90) days from the date the Petition for Rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a diversity case arising in tort for the recovery of monetary damages flowing from a tragic automobile/truck accident in Tennessee. The District Court granted judgment for the Plaintiff on a jury verdict of $754,677.83 which was comprised of $246,677.83 for past medical expenses; $275,000.00 for past pain and suffering; $133,000.00 for future pain and suffering; and $100,000.00 for loss of earning capacity.

The Appellant sought appellate relief to this Court because of the District Court's denial of its post trial Motion for a New Trial and/or for an Additur.

This Court of Appeals affirmed the decision of the Trial Court in a decision entered on December 23, 1996. This Appellant seeks rehearing on the matters cited herein.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On Thanksgiving Eve, November 23, 1992, Christina Leap, was a passenger in a small Dodge Automobile that was law-fully operating on a state highway in McMinn County, Tennessee. Paul Malone, the Defendant below, while driving a 65 foot tractor-trailer in

the opposite direction, made a left turn across the path of and directly in front of the Dodge automobile. The testimony at trial was that he negligently turned in front of the vehicle having either seen the vehicle and misjudged its speed and distance or looked but failed to see the on-coming vehicle was left with less than two (2) seconds to react.

One passenger was killed, and another badly injured and Christina Leap sustained massive injuries, the most serious of which was a severe closed head injury and bleeding of the brain with subsequent permanent scar tissue formation. She was in a coma for nearly 30 days and underwent four major operations during the course of her recovery.

Upon awakening from her coma, she had to be retaught all motor, functional and learned skills, including but not limited to, walking, speech and personal hygiene. She awoke from the coma with the skills of a newborn baby.

Over three years (now 4 years) and with the aid of necessary extensive tutoring and other forms of support, she has been able to resume a limited college curriculum.

At the accident scene, State Troopers' Jones and Yarber investigated. They completed a uniform Accident

Report and scribed into an appropriate portion of the report that they were citing the driver with criminal citation of "reckless endangerment". (In February of 1993, Trooper Yarber executed an Affidavit supporting a change in the citation given to Mr. Malone from criminal misdemeanor "reckless endangerment" to criminal felony "reckless endangerment".)

At trial, Trooper Yarber testified he believed Mr. Malone's conduct in negligently operating the truck, which killed one person and permanently disabled two others, was a violation of the standard of care but "accidental". Outside the presence of the jury, he testified that the conduct of Malone was not "reckless", even though he had pursued in the course of his job and based on his observations at the scene, a citation of criminal reckless endangerment against him. The Court below did not allow the testimony of the criminal reckless citation to go to the jury nor did it allow introduction of the Accident Report.

The Trial Court directed a verdict against the Appellant on the issue of punitive damages. At trial several experts, including Dr. Dennis Sprague (by video equipment) and Dr. Anthony Gamboa, testified on behalf of Tina Leap and, in expert terms, assessed the permanent nature of her injury. The uncontradicted evidence was that her 20% disability would interfere with all aspects of Tina's life.

The model of her return to school would become the model of her life, i.e., she could achieve certain limited levels of success so long as it involved limited schedules and extensive help and support. The return to a limited college curriculum with extensive tutoring was not exceptional but rather that which she would face all of her life in school, in work (if there was an employer who would be able to "tutor" her extensively, continuously) as well as in social venues. Tina would need extensive help all of her life because of the nature of her injury, a severe closed head trauma. Her successes are short-term and sustainable only where she has extensive assistance.

Dr. Gamboa testified that reduced to present value her wage loss, post-injury as compared to her pre-injury capabilities, if she became employable (which was in doubt) was $906,000.00. On the other hand, if she never was able to work again, her loss would be as much as $1.4 million dollars. The testimony was un-contradicted. The jury returned a verdict of $100,000.00 for future lost wages.

The Petitioner appealed the Judgment (C-1) of the District Court to the United States Court of Appeals for the Sixth Circuit which affirmed the decision (A-1) of the District Court (D-1). Subsequently, Petitioners moved for **Rehearing *En Banc***, or alternatively for Panel Hearing which was denied February 10, 1997 (B-1).

Rehearing *En Banc*, or alternatively for Panel Hearing which was denied February 10, 1997 (B-1).

REASONS FOR GRANTING THE WRIT

1. The Case Involves Important Direct and Unresolved Conflicts With Decisions of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits Concerning the Conclusive Effect of Expert Testimony in These Circumstances.

The decision of the Sixth Circuit Court of Appeals conflicts with the decision of the Tenth Circuit Court of Appeals in Stafos v. Missouri Pacific Railroad Company, et. al., 67 F.2d 314 (10th Cir. 1966). Both cases involve expert opinion testimony as to matters outside the competence of lay persons to determine and in each case there was no expert opinion testimony to the contrary. In both cases the testimony was unequivocal, uncontradicted and unimpeached on technical matters beyond the common experience of the lay person's determination and foundation. The Tenth Circuit found that where there was no scientific proof to the contrary, and where there is controlling, positive, uncontradicted and unimpeached evidence, it may not be disregarded even though adduced from interested witnesses and that in such circumstances the trier of fact is bound to honor it. See Stafos, supra, at p. 317. See also Potucek v. Cordeleria Lourds, 310 F.2d 527 (10 Cir. 1962).

contrary findings See Stafos, supra.

In Aetna Life Insurance Company v. Kelley, 70 F.2d 589 (8th Cir. 1934), the U.S. Court of Appeals for the Eighth Circuit held in circumstances such as this where uncontradicted expert testimony is of such great value it may have a weight approximately that of conclusiveness. Where the testimony of an expert witness concerns a subject calling for an expert opinion, it is conclusive to the extent that it may not be contradicted by the testimony of a non-expert witness. See Aetna Life Insurance Company v. Kelly, supra. Common knowledge may not be exercised as against uncontradicted testimony of an expert and when the common knowledge of the jury is of little or no use, then the expert opinion may be given controlling effect. See Aetna, supra. See also Security First National Bank of Los Angeles v. Lutz, 322 F.2d 348 (9th Cir., 1963) Fitts Estate v. C.I.R., 237 F.2d 729 (8th Cir. 1958)

The decision of the Sixth Circuit further directly conflicts with the decisions of other circuits finding that positive testimony uncontradicted by anyone, should control the decision of the court. Greenfeld v. C.I.R., 165 F.2d 318 (4th Cir. 1948); N.L.R.B. v. Ray Smith Transport, Co., 193 F.2d 142 (5th Cir. 1952); Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.2d 676 (2nd Cir. 1944).

But for the testimony of the hopes and dreams of Tina Leap that some day she would be a physical therapist, there was no competent evidence of a bright future for her as it regards her work life. The evidence was of a dismal future. Everyone from Tina's mother to the jury hoped that Tina could someday be permanently and meaningfully employed. The reality of all of the expert testimony which stands uncontradicted is that she will never work except in the same fashion as she goes to school (i.e. on a limited basis and only with a great deal of assistance). The jury, with regard to future income earning potential, returned a verdict based only on hope. In so doing, they completely disregarded the controlling, positive, uncontradicted and unimpeached expert testimony. They did not return a verdict based on the evidence at trial. Accordingly, the Sixth Circuit should have reversed the District Court granting either Additur or a new trial on this issue consistent with the decisions of other Circuits in such circumstances. The failure of the Sixth Circuit to do so creates significant inconsistency in the administration of justice in cases where expert testimony is required to introduce complex scientific and technical evidence yet under the aegis of the Sixth Circuit's reasoning in this case, the jury was permitted to substitute its judgment for that of the expert on matters where lay persons are not competent to make an independent judgment.

The cross-examination of Dr. Gamboa by the defense was not sufficient to create a range different from that which he gave on direct examination. In fact, no alternative sum or means of computing same was elicited from Dr. Gamboa. No where in the cross-examination of Dr. Gamboa was there a suggestion that any reduction in the dollar value, either by a specific number or a percentage to the range of recovery which Dr. Gamboa indicated, was proper during his direct testimony. There was no testimony that the foundation upon which he based his expert opinion (e.g. the 20% disability of the Petitioner post-accident as compared to the pre-accident and emotional issues which remain unresolved in the life of Petitioner, which would cause her to not be able to use her abilities or education) in any circumstance was incorrect. There was no rebuttal to the testimony of Tina's disabilities and no rebuttal to the range of economic loss.

If left undisturbed, the decision of the U.S. District Court, as affirmed by the Sixth Circuit, is an anomaly in the legal system the effect of which is to allow juries to disregard the only controlling evidence on a subject requiring expert opinion testimony (i.e. the complex economic calculation of reduction to present value) in order for jury to make a proper conclusion as to the fair and just amount of compensation to which Tina Leap is entitled. A non-expert witness cannot supply any competent admissible

testimony on such an issue and the defense in this case introduced no expert testimony or alternative theory from the only expert who testified about the future income loss of Tina Leap as the result of her devastating injuries. A jury is required to make an informed decision about matters which must come from expert testimony and where said testimony is uncontradicted and unimpeached, it must be controlling. See Stafos, supra, Aetna, supra, First National Bank of Los Angeles, supra. If rebuttal evidence is offered to the jury through an expert by the defendant as a basis of rejecting in whole or in part expert testimony offered by Plaintiff then the jury has a legitimate basis on which to make a decision. However, it is error to allow a recovery outside the range proffered by the only expert to testify. A few questions by defense counsel which do not in any manner or form suggest to the jury or give the jury a method of reducing by any range, percentage or specific amount that amount to which the expert has testified is no evidence at all and the jury is left to speculate on its own. This is impermissible and has created a significant issue in conflict among the circuits justifying review by the U.S. Supreme Court to promote consistency in the use of expert testimony by juries in such circumstances.

The decision of the Sixth Circuit allows the jury to speculate as to complex matters such as reduction to present value of future wage losses of an individual allowing them

to erroneously calculate, without any expert testimony to the contrary, an award to Tina Leap of only $100,000.00 for her lifetime of wage losses and economic incapacity. The $100,000.00 by the jury awarded in no way relates to the testimony of Dr. Anthony Gamboa, the Plaintiff's expert economist, given on direct or to the testimony of Dr. Gamboa given on cross-examination nor does it relate to the expert testimony of the professionals on which his opinion was based. The $100,000.00 amount awarded by the jury relates to nothing except the decision of the jury to disregard the testimony which it was given during the trial and to find a different amount without any technical foundation for their collective conclusion. The only range established by the evidence on the issues of lost wages was that of Dr. Gamboa, who testified that conservatively the Plaintiff's loss was $906,743.00 and pessimisticly $1,400,000.00. The Petitioner came to federal court simply requesting that a jury fairly review the evidence and make a determination in regard to the tragic accident which irrevocably changed her life. The jury speculated outside the evidence, contrary to the controlling, positive, uncontradicted and unimpeached evidence offered by the only expert who testified. It was established without contradiction that Ms. Leap has a major disability and no evidence was presented to the contrary. She has scar tissue on her brain and a 20% functional disability which is serious enough so as to potentially prevent her from

working at all. The decision of the Sixth Circuit implicitly authorizing a jury to disregard such evidence and to speculate outside the evidence arriving at a conclusion based on lay person's knowledge directly conflicts with the decision of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits and the opinion should be reviewed and reversed by the Supreme Court.

2. This Case Involves An Important, Direct & Unresolved Conflict With The Decision Of The United States Supreme Court In Bene v. Jeantet, 129 U.S. 683, 32 L.Ed. 803, 9 S.Ct. 428 (1889).

The decision of the Circuit Court below conflicts directly with the decision of the United States Supreme Court in Bene v. Jeantet, 129 U.S. 683, 32 L.Ed. 803, 9 S.Ct. 428 (1889). In Bene, the Court considered the testimony of two experts in a patent suit which, even though conflicting, involved the testimony by one expert who actually performed experiments within his knowledge and experience while the opposing expert testified based only on theory. The opinion testimony adopted by the court was founded on facts within the knowledge of an experience of the witness and is supported by valid reasoning. It therefore must receive greater credence and carry more weight than a speculative theory or one which is rendered by per-sons not fully qualified in the field about which they testify. See Bene v. Jeantet, supra and Aetna

Life Insurance Company v. Kelley, supra. The Court described the witnesses' conflicting opinions, only one of which was based upon actual training and experience of the expert, as follows:

> "The testimony of these two witnesses is conflicting but the testimony of Marchand relates to facts declared to be within his knowledge and experience; whilst that of Keith is largely the assertion of a theory and a presentation of arguments to show that the facts testified to by Marchand cannot exist. The experiments which Keith said he had made according to Marchand's formula and which failed to produce refined hair, were, as he admitted, his first experiments for that purpose; whilst those made by Marchand were the results of twelve years of practice, and attested themselves by the specimens produced."

In this case, the Court erred when it concluded that Dr. Gamboa's testimony had weaknesses exposed by cross-examination and therefore the jury could not properly do other than find within the range established by Dr. Gamboa. Where there is present, uncontradicted, unimpeached testimony on technical matters which are beyond the

common experience of the lay person's determination and foundation, the trier of fact cannot disregard the expert's testimony which must be conclusive. See U.S. v. Larkins, 657 F.Supp. 76, (1987) Affirmed 852 F.2d 189 (6th Cir. 1988) cert denied 109 S.Ct. 1131, 489 U.S. 1011, 103 L.Ed. 193, (1989).

3. **The Panel Decision Disregards Sixth Circuit Precedent And Violates *Stare Decisis*.**

The Panel's decision in this case conflicts with the Sixth Circuits decision in Roth Office Equipment Company v. Gallagher, 172 F.2d 452 (6th Cir. 1949) and the decision to do so without an En Banc Hearing of the Sixth Circuit violates the **Doctrine of *Stare Decisis***.

The **Doctrine of *Stare Decisis*** is deeply rooted in our tradition of common law. The Supreme Court has said:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every

> relevant pro-position in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. **The reasons for rejecting any established rule must always be weighed against these factors.**

Moragne v. States Marines Lines, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d. 339 (1970) (emphasis added). The interpretation of the rule of **stare decisis** is left to each court. Hertz v. Woodman, 218 U.S. 205, 212, 20 S.Ct. 621, 622, 54 L.Ed. 1001, 1005 (1910).

The Sixth Circuit has decided how the rule of **stare decisis** will be applied. A panel decision remains controlling unless an inconsistent decision of the Supreme Court requires modification, Salmi v. Secretary of Health and Human Service, 774 F.2d 685, 689 (6th Cir. 1985), there is a change in the substantive law, Smith v. U.S. Postal Service, 766 F.2d 205, 207 (6th Cir. 1985), or the Sixth Circuit sitting **en banc** overrules the decision. See Riddle v. Secretary of Health and Human Services, 817 F.2d 1238, 1244 (6th Cir. 1987) (Engel, Jr. dissenting), rehearing granted, 823 F.2d 164 (6th Cir. 1987).

In Roth Office Equipment Company v. Gallagher, supra, the Court held that unimpeached, uncontradicted

In Roth Office Equipment Company v. Gallagher, supra, the Court held that unimpeached, uncontradicted testimony from a well qualified witness should not be disregarded by the Court but that such testimony should be accepted by the fact finder in a manner in which the fact finder has no knowledge or experience on which he can exercise an independent judgment. In the instant case, precisely this fact situation existed. There was no basis on which the jury could exercise independent judgment because it had no knowledge or experience in complex economic theory, including but not limited to, the complex economic mathematical calculations by which the total amount of future wage losses are reduced to present value. The only testimony introduced into evidence on this question was provided by Dr. Gamboa who was imminently qualified to render his opinion and was admitted as a qualified expert. His testimony therefore constituted con-trolling evidence on which the jury's conclusion should have been based and it should not have been permitted to be disregarded. The failure of the Sixth Circuit to recognize and apply this principle violates its own precedent.

The **Doctrine of *Stare Decisis*** plays an important role in orderly adjudication and serves the broader societal interests and even handed, consistent and predictable application of legal rules. See Thomas v. Washington Gas

Light Company, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d. 757 (1980). The **Doctrine of *Stare Decisis*** weighty in any context, is especially so in matters of admissibility of expert testimony and the controlling effect of same. Reduced to its simplest forms, *Stare Decisis* means that like facts will receive like treatment in a court of law. Flowers v. U.S., 764 F.2d 759 (11th. Cir. 1985).

Tina Leap reasonably relied on the principle that unimpeached, uncontradicted evidence from the expert witness on a complex matter such as the reduction of her future wage loss would be the basis on which the jury would make its decision. Tina was unfairly deprived of the consistent, predictable administration of justice when the panel violated the Doctrine of *Stare Decisis* in its decision.

Justice Roberts comment dissenting in Smith v. Allwright, 321 U.S. 649, 669, 64 S.Ct. 757, 768, 88 L.Ed. 987, 1000 (1944), is apt:

> "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted and the Panel Opinion should be reversed and remanded with instructions to the Court to order a new trial to determine the proper amount of Tina Leap's lost future income.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case No. 95-6470
Filed December 23, 1996

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nº. 95-6470

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINA LEAP	)	
Plaintiffs-Appellants,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
PAUL MALONE AND	)	DISTRICT OF TENNESSEE
F&K LEASING,	)	
Defendants-Appellees.	)	

Decided and Filed December 23, 1996

Before: **NELSON** and **DAUGHTREY**; Circuit Judge;
COHN, District Judge.*
DAVID A NELSON, Circuit Judge.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

This is a personal injury case, filed in federal court on diversity grounds, in which the plaintiff appeals from a judgment entered on a verdict in her favor for three quarters of a millon dollars. The plaintiff takes issue with (1) a directed verdict for the defendants on a claim for punitive damages, (2) the denial of a motion for additur, and (3) certain evidentiary rulings. Finding no error in any of the rulings in question, we shall affirm the judgment.

On November 25, 1992, the plaintiff, college sophomore Christina Leap, was one of two passengers in a Dodge auto-mobile that her grandfather, Paul Sipple, was driving on a state highway in McMinn county, Tennesee. Defendant Paul Malone, driving a 65-foot tractor trailer rig in the opposite direction, started to make a left turn directly in front of the oncoming Dodge. Mr. Malone either failed to see the Dodge or badly misjudged its distance from him. The automobile crashed head-on into the right rear wheels of the tractor. All of the occupants of the car were badly injured, and the second passenger, Mrs. Sipple, eventually died from her injuries.

Tennessee State Trooper Ray Yarber, Jr., arrived at the scene soon after the occurance of the accident, and he called for assistance from Trooper Ken Jones. The latter, an accident reconstruction expert, testified at trial that Mr. Sipple had less than two seconds to react to Mr. Malone's turn.

Trooper Yarber completed a Tennessee Uniform Accident Report form, checking boxes labeled "reckless endanger-ment" and "failure to yield". A McMinn County grand jury returned a "no bill" with respect to reckless endangerment, and Mr. Malone was never prosecuted for that offense. Both of the state troopers testified at trial that Mr. Malone had not been reckless, in their opinion.

Miss Leap suffered a severe closed head injury and internal bleeding of the brain. She remained in a coma for about a month, and she underwent four major operations during the course of her recovery. By the time of trial whe had incurred medical expenses of $246,677.93, and had received physical therapy for three years. It had been necessary for her to relearn her basic motor skills. With extensive tutoring, she had been able to resume a limited college curriculum.

Miss Leap and Mr. Sipple, on behalf of himself and as executor of Mrs. Sipple's estate, sued Mr. Malone and his employer in federal district court. The Sipple claims were settled prior to trial, and the defendants admitted liability for the damages suffered by Miss Leap. Before Ms. Leap's case came on for trial the district court (Collier, J.) granted motions *in limine* to exclude both the Uniform Accident Report and evidence concerning Mrs. Sipple's death and Mr. Sipple's injuries.

During the trial Dr. Anthony Gamboa, testifying as a "vocational economics" expert, offered an economic assessment of Miss Leap's pre- and post-accident abilities. He projected a lifetime wage loss of between $906,000 and $1.4 millon. The former figure was described as "extraordinarily optimistic." The latter figure, Dr. Gamboa testified, was what the wage loss would come to if Miss Leap could never work again. Dr. Gamboa assumed that if the accident had not occurred, Miss Leap could have earned and average of $36,744 per year for 31.9 years; he further assumed that she would now average no more than $19,834 per year for no more than 21 years.

At the close of Miss Leap's case-in-chief the district court directed a verdict in favor of the defendants of the issue of punitive damages. The jury ultimately assessed Miss Leap's recoverable damages at $754,677.83. This figure represented the sum of the following components:(1) $246,677.83 for past medical expenses; (2) nothing for future medical expenses; (3) $275,000 for past pain and suffering; (4) $133,000 for future pain and suffering; and (5) $100,000 for loss of earning capacity. Miss Leap filed motions for a new trial, based on allegedly erroneous evidentiary rulings, and for an additur, based on the allegedly inadequate award for loss of earning capacity. The district court denied both motions. Ms. Leap has perfected a timely appeal.

II

We turn first to the issue of punitive damages, an issue governed in this case by Tennessee law. Tennessee allow the recovery of punitive damages "only in the most egregious of cases." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896,901 (Tenn.1992). The least culpable mental state for which punitive damages may be awarded is "reckless" -- and recklessness must be proved by clear and convincing evidence. *Id.* The *Hodges* court held that a person acts recklessly when he "is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Id.*

We believe the district court acted properly in directing a verdict on the issue of punitive damages. There is no evidence in the record, let alone clear and convincing evidence, to suggest that Mr. Malone's conduct was the result of anything more than inattention or a most unfortunate case of bad judgment. Trooper Jones -- the accident reconstruction expert -- testified that in hs judgment Mr. Malone's behavior had been "accidental," not reckless. Trooper Yarber characterized Mr. Malone's decision to turn when he did as a "mistake;" Yarber rejected a label of "reckless." In light of all of the evidence

presented in this case, we believe that a reasonable mind could draw only one conclusion -- that there was no basis for recovery of punitive damages. The directed verdict was therefore proper. See *Arms v. State Farm Fire & Cas. Co.*, 731 F.2 1245, 1248-49 (6th Cir. 1984) (citing *Holmes v. Wilson,* 551 S.W.2d 682, 685 (Tenn.1977)).

In *Womack v. Gettelfinger,* 808 f.2d 446 (6th Cir.1986), *cert. denied,* 484 U.S. 820 (1987), this court reversed a punitive damages award in another diversity case arising out of an automobile-truck accident in Tennessee. We held there that the defendant truck driver, who caused the collision by turning onto a highway in dense fog, had not been guilty of such gross or wanton negligence as could justify an award of punitive damages. "[P]oor judgment and lack of ordinary care," we observed, "...[are] not the stuff of which ... punitive damages awards are made -- at least not in Tennessee." *Id.* at 453. The Tennessee Supreme Court's decision in *Hodges* subsequently confirmed our understanding of Tennessee law, and we see no basis for deciding the case at bar differently than *Womack v. Gettelfinger.*

III

Miss Leap argues that the district court should have granted an additur to the jury's $100,000 award for loss of future wages. She notes that her expert, Dr. Gamboa,

offered the only evidence on the wage loss issue. Because Dr. Gamboa's testimony was "unimpeached [and] uncontradicted," Miss Leap argues, the jury acted irrationally in awarding a figure below the range proposed by Dr. Gamboa. We do not find the argument persuasive.

The jury was entitled to reject Dr. Gamboa's testimony entirely and to award no damages at all for future loss of wages. Miss Leap admits as much. Her argument boils down to the proposition that, having given some credence to Dr. Gamboa's testimony (as demonstrated by the award of some damages for future lost wages), and in the absence of alternative economic evidence, the jury had to accept the range proposed by Dr. Gamboa.

Defense counsel conducted an effective cross-examination of Dr. Gamboa, however, exposing apparent weaknesses in his opinion. And the jury could reasonably have concluded that the dismal picture of Miss Leap's future presented by Dr. Gamboa was contradicted by other evidence. Miss Leap heself testified that she hoped to become a physical therapist and had resumed -- albeit with tutorial assistance -- a college curriculum. The jury might well have believed that Ms. Leap would be able to work at full pay as a physical therapist, but that she would lose some earnings because her career would begin later than it would have done had there been no accident. This

hypothesis is consistent with the jury's election to award no damages for future medical expenses. We are satisfied that the district court did not abuse its discretion in refusing to grant an additur.

IV

The Federal Rules of Evidence govern diversity cases, see *Laney v. Celotex Corp.*, 901 F.2d 1319, 1320 (6th Cir. 1990), except where the state rule of evidence is substantive in nature. See, *e.g., CMI-Trading, Inc. v. Quantum Air, Inc.*, 98 F.3 887, 891 (6th Cir. 1996) (applying state parol evidence rule in a diversity case.)

A

As noted above, the district court granted the defendants' motion *in limine* to exclude the Uniform Accident Report completed by Trooper Yarber. Tennessee law expressly prohibits the use of accident reports as evidence. Tenn. Code Ann § 55-10-114(b). If this statute is "substantive" it must be applied in diversity cases. If the statute is merely "procedural," on the other hand, the Federal Rules of Evidence must be applied without regard to the statute.

The character of the Tennessee statute need not be definitely resolved here, for we do not believe that it was error to exclude the accident report under either hypothesis. If

the Tennessee statute governs, the statute clearly prohibits introduction of the accident report. If the statute does not govern, Rule 403 of the Federal Rules of Evidence, the text of which is set forth in the margin, amply supports the decision to exclude the report.[1] The probative value of the accident report was minimal, given the fact that the investigating officers were available to testify. The unfair prejudice, on the other hand, was patent. Mr. Malone was not prosecuted for reckless endangerment, a Tennessee grand jury having decided not to indict him on this charge. Troopers Yarber and Jones testified that, in their judgment, Mr. Malone had not been reckless. We assume the plaintiff would have been permitted to explore any inconsistency between this testimony and the report. The district knew, however, that there was no inconsistency -- for Trooper Yarber testified (ourside the jury's presence) that the reckless endangerment citation was issued due to the severity of the accident, not as a result of Mr. Malone's conduct. We cannot say that the district court abused its discretion in excluding the report.

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[1]Rule 403 provides as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

B

Neither did the district court abuse its discretion in granting the defendants' motion to exclude evidence of Mrs. Sipple's death and Mr. Sipple's injuries after the Sipple claims had been settled.

As the district court noted, Miss Leap's claim for pain and suffering was extensively explored through Ms. Leap's own testimony and the testimony of her mother and the treating doctors. The relevance of the Sipples' fates to the pain and suffering of Miss Leap was overshadowed by the unfair prejudice to which the defendants would have been exposed if this evidence had been introduced after the Sipple claims had dropped out of the case.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Sixth Circuit Case No. 95-6470
Filed February 10, 1997

Nº. 95-6470

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINA LEAP *Plaintiffs-Appellants,*	)	
v.	)	ORDER
PAUL MALONE AND F&K LEASING, *Defendants-Appellees.*	)	

Filed February 10, 1997

Before: **NELSON** and **DAUGHTREY**; Circuit Judge;
COHN, District Judge.*
DAVID A NELSON, Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel wishes to amend the first sentence of the third paragraph of page 2 of the opinion to read, "Trooper Yarber completed a Tennessee Uniform Accident Report form and cited the truck driver for 'reckless endangerment.'"

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Service:

Mr. Earl C. Mullins, Jr.
Masters, Mullins & Arrington
1012 S. Fourth Street
Louisville, KY 40203

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

JUDGMENT

Civil No. 1:93-CV-486
entered July 27, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

CHRISTINA LEAP	)	
Plaintiffs-Appellants,	)	
v.	)	JUDGEMENT IN A
	)	CIVIL CASE
PAUL MALONE; ALLOY	)	
FABRICATORS, INC. AND,	)	
F & K LEASING, INC.	)	Case No. 1:93-CV-486
Defendants-Appellees.	)	

[X] **Jury Verdict.** This action came before the Court for a trial by jury. the issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff Christina Leap recover nothing of the defendant Alloy Fabricators, Inc. and that the plaintiff Christina Leap recover of the defendants Paul L. Malone and F & K Leasing, Inc. damages in the sum of Seven Hundred Fifty-Four Thousand Six Hundred Seventy-Seven and 83/100

Dollars ($754,677.83). It is further ORDERED AND ADJUDGED that defendant's motion for judgment as a matter of law on plaintiff's claim for punitive damages is GRANTED.

July 27, 1995 — R. Murray Hawkins

Date

/s/ John L. Medows

(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

MEMORANDUM AND ORDER

Civil No. 1:93-CV-486
filed September 19, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

CHRISTINA LEAP, PAUL SIPPLE, Individually, and PAUL SIPPLE Executor of the Estate of Martha Rose Sipple, deceased *Plaintiffs,*	)	
v.	)	No. 1:93-CV-486
PAUL E. MALONE, ALLOY FABRICATORS,INCORPORATED AND F&K LEASING INCORPORATED, *Defendants.*	)	JUDGE CURTIS L. COLLIER

Filed September 19, 1997

MEMORANDUM AND ORDER

This matter is before the Court upon the plaintiff's motions for new trial (Court File Nos. 65,66,67) and the plaintiff's motion for additur or, in the alternative, for new trial (Court File No. 68). After reviewing the record and the applicable law, the Court concludes the plaintiff's motions are without merit, and they will be **DENIED.**

Plaintiff raises four arguments. First, she contends the Court erred in excluding the Uniform Accident Report issued at the time of the accident, which contained a charge of "Reckless Endangerment" against defendant Malone. Second, she contends the Court erred in granting the defendant's motion for a judgment as a matter of law on the issue of punitive damages. Third, the Court erred in excluding evidence concerning the injuries suffered by Rose and Paul Sipple, the plaintiff's grandparents and fellow vehicle occupants. Lastly, the plaintiff contends she is entitled to an additur or, in the alternative a new trial, based upon the testimony of the plaintiff's economist and the jury's confusion over the issue of pain and suffering.

In this diversity action, the Court applies the substantive law of Tennessee. Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 56 F.3d 726, 733 (6th Cir. 1995), *citing* Bailey v. V & O Press Co., 770 F.2d 601, 604 (6th Cir. 1985). However, whether to grant a new trial is "a federal procedural question and is to be decided by reference to federal law." Strunk v. Hurley, 865 F.2d 261, No. 87-5948 (6th Cir. 1988)(unpublished opinion), *quoting* Toth v. Yoder Co., 749 F.2d 1190, 1197 (6th Cir. 1984). Under Fed. R. Civ. P. 59, "the question of granting or denying of a motion for a new trial following a jury verdict addresses ...the judicial discretion of the trial judge," and is subject to review under the abuse of discretion standard. Toth, 749 F.2d at 1197. "[W]hile the district judge has a

duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached." Bruner v. Dunaway, 684 F.2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (*quoting* TCP Indust. v. Uniroyal, Inc., 661 F.2d 542, 546 (6th Cir. 1981) (quoting Duncan v. Duncan, 377 F.2d 49, 52-53 (6th Cir. 1967), *cert. denied*, 389 U.S. 913 (1967))). Thus, the Court's responsibility is "to prevent an injustice..."Davis v. Jellico Comm. Hosp., Inc., 912 F.2d 129, 133 (6th Cir. 1990) (*quoting* Kilgore v. Greyhound Corp., 30 F.R.D. 385, 387 (E.D. Tenn. 1962)).

A. Exclusion of the accident report

The plaintiff first argues the Court incorrectly excluded the introduction of Plaintiff's Exhibit No. 1, the Uniform Accident Report, and disallowed the testimony of the state troopers concerning the citation for "Reckless Endangerment" set forth in the report. The plaintiff contends these decisions kept the jury from understanding the accident investigation. This evidence, according to the plaintiff, would have served two purposes: to negate Trooper Yarber's testimony he did not believe defendant Malone's actions were reckless and to show the severity of the accident.

Tenn. Code Ann. § 55-10-114(b) provides in pertinent part no accident reports "shall be used as evidence in

any trial, civil, or criminal, arising out of an accident." As with Tenn. Code Ann. §55-9-604 which excludes evidence of non-use of a seatbelt in connection with mitigation of damages, the Court found the Tennessee statutory provision barring admission of accident reports to be substantive rather than procedural and, thus, to be followed by this Court in a diversity action such as this one. However, even if such a provision did not exist, the report's trustworthiness and reliability were called into serious question when both state troopers, present at the scene of the accident and who authored the report, stated under oath defendant Malone's conduct was not reckless but merely negligent. Moreover, the Court took into consideration that Mr. Malone was never formally charged with reckless endangerment and was not convicted of such a charge. Even if the Court had held that the report was admissible to impeach Trooper Yarber, the report itself would not have constituted substantive evidence which could have been used in the manner sought by plaintiff. Fed.R.Evid. 801(d)(1). In light of Tennessee substantive law and testimony adduced at trial, the Court finds no error in the exclusion of the accident report and no basis for a new trial.

B. Punitive damages

Next, the plaintiff contends the Court erred in granting judgment as a matter of law on the issue of punitive damages. The standard for considering a motion

for judgment as a matter of law in diversity cases under Rule 50, Federal Rules of Civil Procedure, is the state standard for a directed verdict. Arms v. State Farm & Cas. Co., 731 F.2d 1245 (6th Cir. 1984). That standard in Tennessee requires the trial court to

> ...take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be draw [sic] from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Id. at 1248 (quoting Holmes v. Wilson, 551 S.W.2d 682, 685 (Tenn. 1977)).

To be entitled to a recovery of punitive damages, the plaintiff had to prove by clear and convincing evidence defendant Malone's conduct was reckless and in conscious disregard of a substantial and unjustifiable risk "of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 900 (Tenn. 1992). The only evidence

presented to the jury[1] supporting the theory of recklessness was (1) the testimony of Sharon Richesin who stated defendant Malone, at the scene, indicated he had not seen the car in which the plaintiff was passenger and (2) the accident itself. On the other hand, the countervailing evidence was overwhelming. Both state troopers present at the scene testified defendant Malone's conduct was not reckless, and defendant Malone testified he misjudged the speed and distance of the oncoming car. None of this evidence supports a theory of reckless conduct as defined by the Tennessee Supreme Court, but, in fact, most, if not all, of it contradicts such a theory. As such, the Court finds no error in granting judgment as a matter of law on the issue of punitive damages and finds no basis for granting a new trial.

C. Rose and Paul Sipple's injuries

The plaintiff also contends she is entitled to a new trial based upon the Court's exclusion of evidence relating to injuries suffered by Rose and Paul Sipple, including the death of Rose Sipple. In its motion for a new trial based upon the exclusion of this evidence, the plaintiff contends such evidence was admissible as relevant to the plaintiff's

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[1]As previously discussed, the Court excluded the accident report which contained the charge of "Reckless Endangerment" at trial.

pain and suffering in having to deal with the death of her grandmother and the injuries suffered by her grandfather. However, in its earlier response to the defendant's motion in limine, the plaintiff argued such evidence was admissible as describing the accident and the nature of plaintiff's own injuries. (Court File No. 56) The Court excluded such evidence on the grounds it was not relevant and any probative value was outweighed by the substantial prejudice to the defendants. The nature and extent of the plaintiff's injuries, both physical and emotional, were thoroughly established by the testimony of the plaintiff, her mother and the medical proof submitted by the plaintiff. Any additional evidence concerning the injuries of the other occupants of the vehicle would have been irrelevant and unduly prejudicial to the defendants' case, especially in light of the Court's ruling in connection with punitive damages. The Court, therefore, finds no error in the exclusion of said evidence and no basis for granting a new trial.

D. Additur

The jury awarded the plaintiff the following damages:

Medical Expenses	$246,677.83
Future Medical Expenses	-0-
Pain & Suffering	275,000.00
Future Pain & Suffering	133,000.00
Loss of Earning Capacity	100,000.00
Total	**$754,677.83**

The plaintiff contends the jury award for loss of earning capacity is too low based upon the testimony of its economist. The jury, as instructed, had the discretion to accept some, all or none of the expert witness's testimony. Further, any confusion the jury may have had concerning pain and suffering was alleviated by subsequent communication with the Court during the course of deliberations. While Tenn. Code Ann § 20-10-101 would permit additur in this case, this Court does not find the jury's award to be outside the "range of reasonableness" based on the evidence adduced at trial. Smith v. Shelton, 569 S.W.2d 421, 427 (Tenn. 1978). The Court will not substitute its judgment for the jury's and, accordingly does not view this argument as a basis for a new trial.

For the reasons set forth herein, the plaintiff's motions for new trial and additur are hereby **DENIED.**

SO ORDERED.

ENTER:

/S/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE